

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH GIBBS,
Plaintiff,
v.
CARSON, et. al.,
Defendants.

Case No. 13-cv-0860-TEH

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Doc. No. 168

CARSON, et. al.,

Defendants.

Plaintiff Kenneth Gibbs, a state prisoner, filed this pro se action under 42 U.S.C. § 1983. The case proceeds against Defendant Anthony for a claim that he violated Plaintiff's due process rights by denying a witness at a 2009 disciplinary hearing.¹ Defendant has filed a motion for summary judgment. Plaintiff has opposed the motion and Defendant filed a reply. For the reasons that follow, Defendant's motion is GRANTED.

1

Plaintiff was incarcerated at Pelican Bay State Prison ("PBSP") during the relevant time.² Second Amended Complaint ("SAC"), Docket No. 89 at 25 of 50.³ Plaintiff is serving a prison term of life without the possibility of parole. Motion

¹ Many other Defendants and claims were previously dismissed from this case.

² The following facts, unless otherwise noted, are undisputed.

³ The Court refers to all page numbers in the SAC as they appear in the Court's electronic docket.

1 for Summary Judgment ("MSJ"), Request for Judicial Notice
2 ("RJA"), Ex. A.⁴ Defendant Anthony was a correctional lieutenant
3 during the relevant time. He served as the senior hearing officer
4 for Plaintiff's disciplinary hearing. MSJ, Van Loh Decl., Ex. G
5 at 1.

6 On October 9, 2008, prison staff searched Plaintiff's cell
7 and discovered an inmate-manufactured weapon. Id., Ex. C at 2.
8 The weapon was a ten-inch-long tightly rolled cylinder of paper
9 topped with a sharpened metal tip. Id. at 2-5.⁵ The weapon was
10 confiscated and Plaintiff was found guilty at a hearing on the
11 Rules Violation Report ("RVR") by another correctional officer.
12 Id., Ex. E.

13 Plaintiff filed an administrative appeal challenging the RVR
14 on the grounds that he had not been allowed to call witnesses
15 during the RVR hearing. Id., Ex. F at 1-3. Plaintiff stated
16 that he wanted to call medical witnesses to demonstrate that the
17 confiscated weapon was in fact a medical device he made to pop
18 herpes blisters in his mouth. Id. at 3-6. The warden reviewed
19 the appeal and issued a modification requiring the RVR to be
20 reheard because the senior hearing officer should have contacted
21 the medical witnesses as part of the investigation. Id. at 4-5.

22 The RVR was reissued on March 24, 2009. MSJ, Van Loh Decl.,
23 Ex. G at 1. Defendant Anthony served as the senior hearing
24 officer for the new RVR hearing. Id. at 4-5. Defendant Anthony
25 assigned Officer Basnett to help Plaintiff gather information for
26

27 ⁴ The Court takes judicial notice of these public records. Lee v.
28 City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

⁵ A photocopy of the weapon was provided. MSJ, Van Loh Decl., Ex.
G at 5.

1 his defense. Id. at 2. Plaintiff told Officer Basnett that the
2 confiscated weapon was a medical device he used to pop blisters
3 and that Nurse Carson verbally authorized Plaintiff to use it.
4 Id. at 2.

5 Officer Basnett spoke to Nurse Carson who stated that no
6 medical device was authorized for Plaintiff because the
7 medication provided to him was sufficient to treat the blisters.
8 Id. at 3. After being shown a picture of the weapon, Nurse
9 Carson stated that medical staff would not have authorized such a
10 device for Plaintiff. Id.

11 Plaintiff disputes this and states that Nurse Carson
12 authorized him to use the device. Opposition at 8-9. Plaintiff
13 includes an affidavit from Nurse Carson to support his assertion.
14 Opposition, Ex. B. However, the affidavit states, "I saw the
15 numerous blisters in [inmate/patient] Gibbs mouth,
16 [inmate/patient] was not being seen after 1 reported problem,
17 [inmate/patient] Gibbs was using instrument to pop blisters."
18 Id.

19 Nurse Carson did state that Plaintiff showed her a sharpened
20 paper clip he had been using to pop blisters. MSJ, Van Loh
21 Decl., Ex. G at 5. It was only about two inches long and did not
22 have a handle. Id.

23 Defendant Anthony conducted the hearing for the reissued RVR
24 on May 3, 2009. Id. at 4. Plaintiff requested five witnesses:
25 Officer Clemons and Lieutenant Diggle to discuss their
26 conversation with Nurse Carson about the alleged weapon;
27 psychologist Archambault to describe his findings; Officer Night
28 to relay a conversation that Plaintiff had with a dental

1 assistant; and Nurse Carson to state that she approved the
2 alleged weapon. Id. at 4-5.

3 Defendant Anthony granted the requests for witnesses Clemons
4 and Diggle. Id. at 4. Defendant Anthony denied the request for
5 Archambault because he was not involved in the investigation and
6 had no knowledge of relevant issues. Id. at 4. Defendant
7 Anthony denied the request for Night, because Plaintiff could
8 describe the conversation with the dental assistant and because
9 Night's testimony would be cumulative. Id. Defendant Anthony
10 denied the request for Nurse Carson because her testimony was in
11 Officer Basnett's report; Clemons and Diggle could testify about
12 their conversations with her about the alleged weapon; and Nurse
13 Carson was not on duty at the time of the hearing. Id. at 5.

14 After the hearing, Defendant Anthony found Plaintiff guilty
15 of possession of a weapon. Id. at 6. He found that the device
16 was a deadly weapon capable of inflicting serious or lethal
17 injury. Id. Defendant Anthony rejected Plaintiff's testimony
18 that medical staff instructed him to make the device for medical
19 reasons. Id. Defendant Anthony found that even if Plaintiff
20 used the device to pop blisters, it could also have been used as
21 a deadly weapon. Id.

22 Plaintiff was assessed a 360-day forfeiture of good-time
23 credits and a twelve-month Security Housing Unit ("SHU") term.
24 Id. at 7. Yet, the SHU term was not imposed because on June 9,
25 2009, the Institutional Classification Committee suspended it and
26 released Plaintiff to general population. MSJ, Van Loh Decl.,
27 Exs. H, I.

28

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II

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A

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Summary judgment is properly granted when no genuine
disputes of material fact remain and when, viewing the evidence
most favorably to the nonmoving party, the movant is clearly
entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c);
Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins.
Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987). The
moving party bears the burden of showing there is no material
factual dispute. Celotex, 477 U.S. at 331. Therefore, the Court
must regard as true the opposing party's evidence, if supported
by affidavits or other evidentiary material. Id. at 324;
Eisenberg, 815 F.2d at 1289. The Court must draw all reasonable
inferences in favor of the party against whom summary judgment is
sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475
U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem.
Co., 952 F.2d 1551, 1559 (9th Cir. 1991).

18

The moving party bears the initial burden of identifying
those portions of the pleadings, discovery and affidavits which
demonstrate the absence of a genuine issue of material fact.
Celotex, 477 U.S. at 323. If the moving party meets its burden
of production, the burden then shifts to the opposing party to
produce "specific evidence, through affidavits or admissible
discovery material, to show that the dispute exists." Bhan v.
NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir.) cert. denied,
502 U.S. 994 (1991); Nissan Fire & Marine Ins. Co. v. Fritz Cos.,
210 F.3d 1099, 1105 (9th Cir. 2000).

28

Material facts that would preclude entry of summary judgment

1 are those which, under applicable substantive law, may affect the
2 outcome of the case. The substantive law will identify which
3 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
4 242, 248 (1986). Questions of fact regarding immaterial issues
5 cannot defeat a motion for summary judgment. Reynolds v. County
6 of San Diego, 84 F.3d 1162, 1168-70 (9th Cir. 1996), rev'd on
7 other grounds by Acri v. Varian Associates, Inc., 114 F.3d 999
8 (9th Cir. 1997). A dispute as to a material fact is genuine if
9 there is sufficient evidence for a reasonable jury to return a
10 verdict for the nonmoving party. Anderson, 477 U.S. at 248.

B

12 Interests protected by the Due Process Clause may arise from
13 two sources: the Due Process Clause itself and laws of the
14 states. See Meachum v. Fano, 427 U.S. 215, 223-27 (1976).
15 Changes in conditions so severe as to affect the sentence imposed
16 in an unexpected manner implicate the Due Process Clause itself,
17 whether or not they are authorized by state law. See Sandin v.
18 Conner, 515 U.S. 472, 484 (1995). Deprivations authorized by
19 state law that are less severe or more closely related to the
20 expected terms of confinement may also amount to deprivations of
21 a procedurally protected liberty interest, provided that (1)
22 state statutes or regulations narrowly restrict the power of
23 prison officials to impose the deprivation, i.e., give the inmate
24 a kind of right to avoid it, and (2) the liberty in question is
25 one of "real substance." See id. at 477-87.

26 Allegations by a prisoner that he was denied due process in
27 conjunction with a disciplinary proceeding do not present a
28 constitutionally cognizable claim, however, unless the

1 deprivation suffered is one of "real substance" as defined in
2 Sandin. "Real substance" will generally be limited to freedom
3 from (1) restraint that imposes "atypical and significant
4 hardship on the inmate in relation to the ordinary incidents of
5 prison life," id. at 484 or (2) state action that "will
6 inevitably affect the duration of [a] sentence," id. at 487. In
7 determining whether a restraint is an "atypical and significant
8 hardship," Sandin suggests that courts should consider whether
9 the challenged condition mirrored the conditions imposed on
10 inmates in administrative segregation and protective custody, and
11 thus comported with the prison's discretionary authority; the
12 duration of the condition; the degree of restraint imposed; and
13 whether the discipline will invariably affect the duration of the
14 prisoner's sentence. See Serrano v. Francis, 345 F.3d 1071, 1078
15 (9th Cir. 2003).

16 Prisoners retain their right to due process subject to the
17 restrictions imposed by the nature of the penal system. See
18 Wolff v. McDonnell, 418 U.S. 539, 556 (1974). Thus although
19 prison disciplinary proceedings are not part of a criminal
20 prosecution and the full panoply of rights due a defendant in
21 such proceedings does not apply, where serious rules violations
22 are alleged and the sanctions to be applied implicate state
23 statutes or regulations which narrowly restrict the power of
24 prison officials to impose the sanctions and the sanctions are
25 severe, the Due Process Clause requires certain minimum
26 procedural protections. See id. at 556-57, 571-72 n.19.

27 Wolff established five procedural requirements. First,
28 "written notice of the charges must be given to the disciplinary-

1 action defendant in order to inform him of the charges and to
2 enable him to marshal the facts and prepare a defense." Wolff,
3 418 U.S. at 564. Second, "[a]t least a brief period of time
4 after the notice, no less than 24 hours, should be allowed to the
5 inmate to prepare for the appearance before the [disciplinary
6 committee]." Id. Third, "there must be a 'written statement by
7 the factfinders as to the evidence relied on and reasons' for the
8 disciplinary action." Id. (quoting Morrissey v. Brewer, 408 U.S.
9 471, 489 (1972)). Fourth, "the inmate facing disciplinary
10 proceedings should be allowed to call witnesses and present
11 documentary evidence in his defense when permitting him to do so
12 will not be unduly hazardous to institutional safety or
13 correctional goals." Id. at 566; Fifth, "[w]here an illiterate
14 inmate is involved . . . or [where] the complexity of the issue
15 makes it unlikely that the inmate will be able to collect and
16 present the evidence necessary for an adequate comprehension of
17 the case, he should be free to seek the aid of a fellow inmate,
18 or . . . to have adequate substitute aid . . . from the staff or
19 from a[n] . . . inmate designated by the staff." Wolff, 418 U.S.
20 at 570.

21 The Court specifically held that the Due Process Clause does
22 not require that prisons allow inmates to cross-examine their
23 accusers, see id. at 567-68, and does not give rise to a right to
24 counsel in the proceedings, see id. at 569-70.

25 III

26 Plaintiff contends there was a violation of the fourth Wolff
27 protection because he was not allowed to call Nurse Carson as a
28 witness in his defense. Defendant first argues that Plaintiff

1 was not deprived of a protected liberty interest.

2 Defendant asserts that there was no deprivation under Sandin
3 because Plaintiff did not suffer an atypical and significant
4 hardship and because the duration of his sentence was not
5 affected. An inmate whose lost good-time credits are restored
6 has failed to identify a protected liberty interest because the
7 length of the sentence was not affected. See Womack v. Grannis,
8 453 F. App'x 713 (9th Cir. 2011).

9 In this case, Plaintiff was assessed a 360-day forfeiture of
10 good-time credits and a twelve-month SHU term. While the good-
11 time credits were not restored, it is undisputed that Plaintiff
12 is serving a prison term of life without the possibility of
13 parole; therefore, the forfeiture of credits does not affect
14 Plaintiff's sentence because there is no possibility of parole.
15 See Pena v. Spearman, No. C 13-3983 SBA (PR), 2015 WL 435062, at
16 *3 (N.D. Cal. Feb. 2, 2015) (disciplinary finding resulting in
17 loss of time credits did not affect duration of sentence because
18 plaintiff is serving a life sentence).

19 Nor was there an atypical and significant hardship as a
20 result of the RVR. The twelve-month SHU term was suspended
21 approximately one month after Defendant found Plaintiff guilty,
22 and Plaintiff was returned to general population. Typically,
23 placement in segregated housing in and of itself does not
24 implicate a protected liberty interest. See Serrano, 345 F.3d at
25 1078; see, e.g., Sandin, 515 U.S. at 485-86 (inmate's thirty-day
26 placement in disciplinary segregation, where conditions mirrored
27 conditions imposed upon inmates in administrative segregation and
28 protective custody, did not result in type of atypical,

1 significant deprivation). While Plaintiff may have been in
2 segregated housing prior to the reissued RVR, there are no
3 allegations that Defendant Anthony was involved in that
4 placement. Defendant Anthony's sole involvement in this case was
5 serving as hearing officer for the second disciplinary hearing.
6 Because Defendant Anthony did not affect the duration of
7 Plaintiff's sentence when he imposed a punishment that did not
8 cause atypical and significant hardship, summary judgment is
9 granted for Defendant.

10 Even if there was a deprivation of a protected liberty
11 interest, Plaintiff still received all the procedural protections
12 required. His only allegation is that Defendant Anthony denied
13 one witness, Nurse Carson. It is undisputed that Plaintiff
14 requested five witnesses and that two of the five were provided.

15 Prison officials are not required to place in the
16 "administrative record" their reasons for refusing to allow
17 witnesses to testify, but may wait to provide the explanation in
18 court if the refusal is challenged. See Ponte v. Real, 471 U.S.
19 491, 497 (1985). But see Serrano, 345 F.3d at 1079-80 (finding a
20 due process violation where hearing officer failed to offer a
21 convincing explanation for why he did not allow witnesses and
22 failed to follow state regulation requiring him to document his
23 reasons for refusing to grant inmate's request for a witness).
24 Prison officials can note that the reason for denying a witness
25 may be for "irrelevance, lack of necessity, or the hazards
26 presented in individual cases." Wolff, 418 U.S. at 566.

27 In this case, Defendant Anthony described the reasons for
28 denying Nurse Carson. He denied the request because her

1 testimony was in Officer Basnett's report; witnesses Clemons and
2 Diggle would be available to testify about their conversations
3 with her about the alleged weapon; and Nurse Carson was not on
4 duty at the time of the hearing. Plaintiff's rights were not
5 violated because Nurse Carson's testimony was presented through
6 other witnesses and reports. There is no indication that Nurse
7 Carson's testimony would have differed from what was conveyed by
8 the reports and other witnesses. The testimony indicated that
9 she did not give Plaintiff permission for any type of medical
10 device, let alone some sharpened metal at the end of a ten-inch
11 handle. The testimony also reflected that she was aware that he
12 was using another device, a two-inch paper clip, to pop his
13 blisters.

14 Plaintiff contends that she would have testified that she
15 gave him permission to have the confiscated device in order to
16 pop his blisters. However, this contention is contradicted by
17 Plaintiff's own evidence. Plaintiff has submitted an affidavit
18 from Nurse Carson stating that she was aware he was using another
19 instrument to pop his blisters. She does not state that she gave
20 him permission or authorization for the confiscated device.

21 Even if Nurse Carson gave permission for the use of a paper
22 clip, she did not approve a ten-inch handle with a metal point.
23 Regardless, even if such a device had a medical use, Defendant
24 Anthony found that it was still a deadly weapon.

25 Summary judgment is granted to Defendant Anthony because the
26 undisputed facts demonstrate that there was no due process
27 violation. While Nurse Carson did not testify, her statements
28 that she was aware of Plaintiff using a two-inch paper clip to

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1 pop his blisters were presented and considered by Defendant
2 Anthony. Regardless of her not testifying, there was no
3 deprivation of a protected liberty interest because Plaintiff's
4 sentence was not affected and there was no atypical and
5 significant hardship because the SHU-term was suspended and
6 Plaintiff was released to general population.⁶

7 Even if Defendant Anthony violated Plaintiff's due process
8 rights, Anthony is still entitled to qualified immunity. It
9 would not be clear to a reasonable official that denying an
10 inmate's request to have a witness testify at a disciplinary
11 hearing would be unlawful when the substance of the witness'
12 testimony was presented through other witnesses and reports. For
13 all these reasons the motion for summary judgment is granted.

14 IV

15 For the foregoing reasons, the Court hereby orders as
16 follows:

17 1. Defendant's motion for summary judgment (Docket No. 168)
18 is GRANTED.

19 2. The Clerk shall close the file. This order terminates
20 Docket No. 168.

21 IT IS SO ORDERED.

22 Dated: 02/17/2016



THELTON E. HENDERSON

23
24 United States District Judge

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26
27 _____
28 ⁶ This action does not concern the sufficiency of the evidence to
find Plaintiff guilty of the RVR, just the denial of the witness
at the RVR hearing.